SUPREME COURT, U. S.

JAN 28

MICHAEL RODAK, JR.

No. 73-1156

In the Supreme Court of the United States

OCTOBER TERM, 1973

EVANGELINE PARISH SCHOOL BOARD,
LOUISIANA STATE BOARD OF EDUCATION,
LAWRENCE VIZINAT, ET AL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered August 22, 1973.

CITATIONS TO OPINIONS BELOW

The decision of the District Court is unreported and is printed as Appendix "A" hereto, page__. The decision of the Circuit Court of Appeals is printed as Appendix "B" hereto, page__, and is reported in 484 F.2d 649.

JURISDICTION

Judgment of the District Court was entered on July 31, 1972. Judgment of the Court of Appeals was

entered on August 22, 1973. Application for rehearing was timely applied for and was denied on October 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Did the District Court err in permitting the United States Government to intervene in this case, at this time, for the particular relief sought and in concluding that the United States Government had standing to seek such relief?

2. Did the Court of Appeals err in reversing the District Court's refusal to grant the Government's request to enjoin the Evangeline Parish School Board from continuing to provide textbooks and transportation to students in Evangeline Parish who happen to have chosen to attend one particular non-public school where the Government had not requested the Court to enjoin the School Board from providing such textbooks and transportation to children of Evangeline Parish who happen to have chosen to attend another non-public school, when to do so would have required the Court:

A. To speculate as to the motive of the children and parents in choosing to attend non-public schools over public schools.

B. To speculate as to the motives of children and parents in choosing to attend one particular nonpublic school over another non-public school.

C. To discriminate against children attending

one non-public school in favor of children attending another non-public school.

D. Where the evidence clearly reflects that the providing of such minimal aid to such students has not prevented the Evangeline Parish School Board from operating and maintaining a completely integrated school system.

E. Where the evidence clearly reflects that the students under attack by the Government are attending school under no more segregated conditions than the students attending the other non-public school in Evangeline Parish.

F. Where granting the relief sought by the Government as to some students only would amount to a denial of equal protection of the laws as to such students.

STATUTES INVOLVED

The statutes and constitutional provisions involved in this case are the Fourteenth Amendment to the Constitution of the United States of America; Louisiana Revised Statutes, Title 17, Section 158, 351, 352, and 353; 42 U.S.C. 2000h-2 and 42 U.S.C. 2000c-6.

STATEMENT OF THE CASE

Jurisdiction of the District Court was invoked by the respondent, the United States Government, as intervenor, under 42 U.S.C. 2000h-2, making the Evangeline Parish School Board and the Louisiana State Board of Education defendants.

Lawrence Vizinat, et al, intervened as parents of children attending Evangeline Academy and as members of the Board of Directors of Evangeline Academy.

Sections 158, 351, 352, and 353 of Title 17 of the Louisiana Revised Statutes set forth Louisiana's historical benevolent policy of providing minimal state aid (transportation, textbooks, pencil and paper) to children in Louisiana who choose to acquire their education in non-public schools. These statutes require each parish school board to provide such aid to the children attending non-public schools in their parish. This benevolent policy was reviewed by this Court many years ago and held constitutional. See *Cockran v. Louisiana State Board of Education*, 50 S.Ct. 335, 281 U.S. 370, 74 L.Ed. 913. The Evangeline Parish School Board has always complied with this policy in a non-discriminatory manner providing such aid to children attending any non-public school in the parish whether church-oriented or not.

Until September, 1969, there was only one non-public school in Evangeline Parish, Sacred Heart Academy, which was operated by the Catholic Church. Its facilities are limited and for years there has been a waiting list of students desiring admission. Although it does not prohibit the admission of students because of race, it had no Negro students or Negro faculty members until the school year 1970-71 when its enrollment consisted of 980 white students and 1 black student. It still has no black faculty members.

As capacity was limited at Sacred Heart Academy, a group of parents formed Evangeline Academy in September, 1969. This school, likewise, has no policy prohibiting admission to Negro students. It, likewise, has no Negro faculty members and no Negro students.

However, in the short time it has been in existence, no Negro student has ever applied for admission.

The United States Government, due to the unrest resulting from integration of schools in the summer of 1969, became an intervenor in the original school desegregation suit, "Graham v. Evangeline Parish School Board," No. 11053 on the docket of the United States District Court for the Western District of Louisiana.

After that intervention was completed, Evangeline Parish School Board implemented for the 1969-70 school year a school desegregation plan worked out jointly between the School Board and the Department of Health, Education and Welfare. This plan resulted in the complete integration, both students and faculty, of each and every school in the Evangeline Parish school system, and the school system is still peacefully operating today under that plan. That previous intervention is the only time the United States Government has been involved in this matter until it filed, in 1972, the present motion seeking to enjoin the School Board from providing this minimal aid to the students attending Evangeline Academy.

The Government also contended that some of the school bus routes operated by the Evangeline Parish School Board should still be considered as dual routes and ordered discontinued. On examination, the School Board recognized that there were some deficiencies in its bus routes and abandoned its defense to this allegation. The District Court granted the Govern-

ment's motion for summary judgment with respect thereto, and petitioner did not raise this question on appeal.

On the trial of the issue of textbooks and transportation to children attending Evangeline Academy, the Government failed to produce any evidence that Evangeline Academy had a policy of prohibiting admission to Negro children. Furthermore, the Government's own witness testified that no Negro child had ever applied for admission to Evangeline Academy during its short existence. On the other hand, the evidence revealed that in the long existence of Sacred Heart Academy, only one Negro child had been admitted and no Negro faculty members had ever been employed at Sacred Heart Academy. The evidence, including the stipulation entered into between the Government and the School Board, also reveals that the existence of Evangeline Academy (and also Sacred Heart Academy) have not prevented, or jeopardized, a completely integrated public school system in Evangeline Parish.

For the convenience of the Court we set forth below the student enrollment by race for each of the public schools in Evangeline Parish, as well as the two private schools, for the school years 1968-69, 1969-70, 1970-71, which were before the District Court. We have also updated these figures to include the 1971-72, 1972-73 and 1973-74 school years. We have also included the faculty breakdown by race for the present, 1973-74, school year which is also typical of the preceding years.

EVANGELINE PARISH PUBLIC SCHOOLS

SCHOOL	STUDENT COMPOSITION												FACULTY	
	1968-69		1969-70		1970-71		1971-72		1972-73		1973-74		1973-74	
	White	Black	White	Black	White	Black	White	Black	White	Black	White	Black	White	Black
Basile High	726	14	438	136	443	131	429	133	431	133	427	128	25	7
Bayou Chicot High	500	7	214	96	288	95	284	85	313	90	372	97	21	8
Carver Elementary	0	204	33	111	67	105	66	111	61	98	61	106	5	4
Chataigner High	245	25	123	157	126	174	132	176	144	200	168	194	17	7
Hester Heath Elementary	0	122	92	48	120	55	148	46	147	44	165	44	7	3
Mamou Lower Elementary	920	0	301	203	388	187	413	178	402	170	383	182	19	7
Mamou High	265	1	178	69	199	65	251	77	250	76	261	61	16	6
Mamou Upper Elementary	0	558	204	127	264	138	331	122	333	123	344	141	12	10
Pine Prairie High	590	6	523	43	569	32	572	32	585	36	616	45	26	11
Vidrine High	302	0	183	193	223	171	241	179	282	200	314	184	21	8
Ville Platte High	1,215	0	209	293	149	485	162	470	150	474	265	651	30	17
Ville Platte Lower Elementary	841	6	137	503	204	651	192	592	210	681	219	690	32	12
James Stephen Elementary	0	2,098	94	1,187	244	911	255	877	291	952	295	804	27	20
W. W. Stewart Elementary	0	229	176	84	163	88	188	84	201	80	196	84	10	6
PRIVATE SCHOOLS														
Sacred Heart	689	0	898	0	980	1	1,044	1	1,130	3	1,175	2	48	0
Evangeline Academy			2,149	0	1,868	0	1,577	0	1,506	0	1,144	0	39	0

The judgment of the District Court was rendered July 31, 1972. The United States timely noticed its appeal therefrom and on August 22, 1973, the United States Court of Appeals for the Fifth Circuit rendered judgment vacating the judgment of the District Court and remanding on the authority of this Court's decision in *Norwood v. Harrison*, ___ U.S. ___, 37 L.Ed.2d 723, 93 S.Ct. ___, decided June 25, 1973. Appellees timely applied for a rehearing which was denied October 30, 1973.

Although the Court of Appeals merely vacated and remanded to the District Court, it clearly held, contrary to the record, that children attending Evangeline Academy, whatever their true reason may be, were conclusively presumed to be fleeing from the integrated public schools merely because no Negro children were attending Evangeline Academy even though no Negro child had ever been denied admission to Evangeline Academy. Under the facts of this case, and on the record before the Court of Appeals, the decision of the Court refuses to apply the same rule to students who attend a Catholic private school where all but one of 981 students are white.

In addition, although the question of the Government's right to intervene for this purpose at this time and its standing to bring this action were properly raised in the District Court and on appeal, the Court below issued no ruling on this contention of petitioner. See application for rehearing attached hereto as Appendix C.

It is from this decision of the Court of Appeals that petitioner applies to this Court for writ of certiorari.

REASON FOR GRANTING THE WRIT

1. The decision of both the District Court and the Court of Appeals holding that the United States Government had a right to intervene in this proceeding, at this time, for this purpose and had standing to bring this action are in conflict with decisions of this Court in *Tilleston v. Ulman*, 318 U.S. 44, (1942); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947, as well as the decision of other federal courts, including *Abele v. Markle*, (1971) 452 F.2d 1121, and *Lemon v. Kurtzman* (three-judge court) 310 F.Supp. 35, reversed on other grounds, 91 S.Ct. 2105, 403 U.S. 62, 29 L.Ed.2d 745.

As set forth in its Motion to Intervene, and in its Memorandum in support thereof, the sole basis for the intervention of the United States in this particular case at this particular time for the particular purpose sought is Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h-2). 42 U.S. 2000h-2 provides in pertinent part as follows:

> ". . . . whenever an *action has been commenced* in any Court of the United States seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of race, color, religion or national origin, the Attorney General for or in the name of the United States *may intervene* in *such action* upon *timely* application if the Attorney

General certifies that *the case* is of general public importance. . ." (Emphasis added)

This action (the original public school desegregation suit in Evangeline Parish) was commenced by private plaintiffs on May 4, 1965, seeking to enjoin the School Board from discriminating against plaintiffs (and the class they represent) in violation of the "equal protection" clause of the Fourteenth Amendment to the United States Constitution by assigning them to particular schools solely because of their race. This was the only relief sought. The subject matter of this suit has been heard by this Court on several occasions with Orders of this Court being issued from time to time reflecting the changes in the Constitutional requirements applicable to petitioner, Evangeline Parish School Board, in operating its school system. Such Constitutional requirements have been defined and redefined from time to time by the Appellate Courts through "freedom of choice" and converting to a unitary school system within which no person is excluded from any school in the system because of his race, color or national origin. Orders of this Court have issued requiring a rigid type freedom of choice plan as was then acceptable in this Circuit. Petitioner obeyed that Order of this Court. A subsequent Order of this Court directed the Board to implement a unitary school system desegregation plan approved and devised by the Department of Health, Education and Welfare and the School Board. Petitioner implemented, and is operating under that Court Order at the present time.

Under that plan, no child is effectively excluded, directly or indirectly, from any school in the system because of his race, color or national origin. See *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969) and *Swann v. Charlotte Mecklenburg Board of Education*, 39 U.S.L.W. 4437 (1971). Under the Order of this Court issued pursuant to *Green* and *Alexander* and affirmed just recently by *Swann*, petitioner, Evangeline Parish School Board is operating a completely unitary school system. Every Negro child attending the public schools in Evangeline Parish is attending an integrated school, and was attending integrated schools at the time the Government's Motion was filed.

Consequently, the only "action" which "has been commenced" in Evangeline parish against this petitioner had been completed when the Government filed its Motion to Intervene. All relief sought by plaintiffs in such action had been granted and enforced by an Order of this Court prior to the Government's present Motion to Intervene. We strongly suggest to the Court that a case which has already been tried and completed and judgment rendered can hardly be of the "general public importance" necessary to give the Government the right to intervene claimed under 42 U.S.C. 2000h-2. Furthermore, it can hardly be said that an application to intervene after completion of a lawsuit is a "timely application".

The Government, in its Memorandum, cites the

cases of *United States v. Greenwood Municipal Separate School District*, 406 Fed. 2d 1086 (Fifth Circuit 1969) and *United States v. Junction City School District*, 253 Fed. Supp. 766 (W.D. Ark. 1966) in support of their proposition that this Court cannot "go behind the certificate to question the basis of his conclusion".

However, as admitted in their Memorandum, these cases refer to the Attorney General's certificate under 42 U.S.C. 2000c-6 which is not the section of the Civil Rights Act relied upon by the Government to justify its intervention here.

Indeed, they obviously could not proceed under 42 U.S.C. 2000c-6 as that section requires,

> (1) *a complaint in writing by a parent or group of parents that their children are being deprived by a School Board of the equal protection of the laws* or by an individual or his parent to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion or national origin. (Emphasis added).

In this case, there has been no complaint to the Attorney General by any parent that his children are being denied the equal protection of the laws or refused admission to any school. Obviously, there could be no such complaint as every Negro child attending the public schools in Evangeline Parish is attending a desegregated school and every Negro child of school age in Evangeline Parish is provided the same aid by defendant, Evangeline Parish School Board that every

other child is provided. Instead, as will be argued more fully hereafter, the Government is here attempting to make a collateral attack, using this dead lawsuit as a vehicle, on a time honored and Supreme Court approved policy of limited educational aid to all children of school age regardless of their race, color or national origin and regardless of what non-public school they attend.

The Government attempts to justify their application for intervention as meeting the requirements of 42 U.S.C. 2000h-2 that it may intervene "upon timely application" on the basis that the prior orders of this Court, or action taken in this case prior to September, 1969, are unimportant and on the allegation that it was made amicus curiae pursuant to Judge Putnam's Order of August 28, 1969, and could well have sued for the injunction sought here under that status.

With regard to the Government being designated amicus curiae, the record shows that this was necessary only because a prior Order of this Court was under direct frontal attack by a group of white citizens proceeding in State Court to have the State Court enjoin defendant from complying with the Order of this Court. See *Paul Manuel, et als. v. Evangeline Parish School Board*, 13th Judicial District Court, State of Louisiana. Furthermore, under a threat of virtual physical violence by some 1500 to 2500 citizens, defendant had acquiesced in a demand to close the schools and participation by the United States Government, in order to avoid another Little Rock, Arkansas, was

deemed necessary by this Court. That was the sole object and authority of the Government as amicus curiae.

In support of its contention that this application to intervene is timely filed, the Government cites only the case of *United States v. Jefferson County Board of Education*, 372 Fed. 2d 836, (Fifth Circuit, 1966); affirmed as modified en banc, 380 Fed. 2d 385 (Fifth Circuit, 1967) as holding that intervention by the United States twelve days after the Board submitted its desegregation plan to the Court was timely filed. *However, they fail to mention that in that case the intervention by the Government, although twelve days after the School Board submitted its plan to the District Court, was two (2) days before the original plaintiffs filed objections to the plan and before the Court had issued an Order approving a plan.* Here their application to intervene comes not only *not before* the Court had issued a final Order in this proceeding, but *almost two years after such Order was issued.* It can hardly be said that the intervention permitted in *Jefferson* as timely can stand as support for an intervention for the purpose sought here almost two years after a unitary school system has been put into effect.

Consequently, defendants respectfully suggest that the statute relied upon by the United States Government for a right to intervene, 42 U.S.C. 2000h-2, never contemplated an intervention in this type lawsuit for the purpose sought by the Government; never contemplated that this type action could be of "general

public importance" at this stage of its proceeding for the purpose here sought; nor that an application to intervene almost two years after a final Court Order and after a final unitary school system has been put into operation would be a "timely application". Therefore, we respectfully suggest that the District Court erred in permitting the United States Government to intervene in this proceeding.

In addition, there is a serious question as to the Government's standing to institute this suit. In fact, there would be, and is, a serious question as to whether or not the plaintiffs in this suit have standing to sue for the relief here sought. There has been no showing that the Government has the personal and direct interest, or will suffer the irreparable damage, that is necessary to give it standing to sue in this case. The plaintiffs themselves would have difficulty in showing the requisite standing necessary to prosecute this action for the relief sought. None of the plaintiffs can show that they have been discriminated against in any way, refused admission to any public school, deprived of the use of public facilities, or even denied admission to any particular private school. In such a situation plaintiffs clearly lack standing to sue. *Brown v. Lutz*, USDC, E.D. Louisiana No. 70-23, September 25, 1970, 316 F. Supp. 1096; *Lemon v. Kurtzman*, 310 F. Supp. 35, E.D. Pennsylvania 1965, on other grounds, 91 S. Ct. 2105, 403 U.S. 602.

Each of these cases involves an attack on some form of public aid to children attending private schools. The attacks were based upon both due process

and equal protection clauses of the Fourteenth Amendment. No appeal was taken from the decision of the District Court in *Brown v. Lutz.*

In *Lemon*, the Three-Judge District Court held, unanimously, that none of the plaintiffs had standing to sue under the equal protection clause. In the *Lemon* case, there were both individual plaintiffs and organizational plaintiffs whose position was similar, if not identical, to the position of the Government here. For example, plaintiff, Lemon, in addition to being a citizen and taxpayer, was a Negro parent of a child attending public school in Pennsylvania. The N.A.A.C.P., with other organizations, appeared as persons resident in the Commonwealth of Pennsylvania which,

> ". . . share as a common objective. . . the opposition to *the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or Otherwise discriminate against persons by reason of race* or religion . . . or *whose purpose is to seek the elimination of racial discrimination* through resort to judicial proceedings and otherwise . . ." (Emphasis added)

The three judge court in *Lemon*, in disposing of plaintiffs contention that they had standing to sue, said:

> ". . . the fundamental aspect of standing, as recently articulated by the Supreme Court, it that "it focuses on the party seeking to get his complaint before a federal court ***." Flast v. Cohen, 392 U.S. 83, 99, 88, S. Ct. 1942, 1952, 20 L. Ed.

> 2d 947 (1967). The Flast decision further noted that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has '*a personal stake* in the outcome of the controversy' * * * and whether the dispute touches upon '*the legal relations of parties having adverse legal interests.*' (Emphasis added by the Court).

The Court then said with regard to the organizational plaintiffs,

> ". . . regardless of the good motives of these organizations, the mere fact that the instant case may result in a decision which may be in accord with or adverse to the respective general purposes of these organizations we believe is insufficient to establish standing to sue as an affected party in interest. Consequently, the organizational plaintiffs have failed to establish standing as to both religious and equal protection issues involved in the instant case. . ."

The Government in this case is in a similar, if not identical, position to that of the organizational plaintiffs in *Lemon*. It is an organization and its purpose under the Civil Rights Act of 164 is virtually identical to that if the N.A.A.C.P. in *Lemon*. Clearly, it has no more standing to sue than would the N.A.A.C.P.

In addition, even if plaintiffs were suing for the relief here sought, which they have not, the Court in *Lemon* clearly holds that they also have no standing to sue. With regard to their standing, the Court said:

> ". . . it is alleged generally in the complaint that the private schools which have contracted or will

contract wth the Commonwealth under the Education Act intentionally discriminate in the selection of students and/or teachers or are de facto segregated by race or religion. It is further alleged that the funds allocated by the Commonwealth to these schools under the act will be used to perpetuate and support these practices and as such there is State action involved. We will assume for the purposes of deciding this aspect of the standing issue that these alleged facts could be proved at a hearing on the merits. Nevertheless, *these plaintiffs lack standing to challenge the Education Act under the equal protection clause of the Fourteenth Amendment.*

The Education Act on its fact does not use religion or race as a standard or guideline to determine who may enter into a contract with the Commonwealth. As such the Act itself does not purport to make any classifications to deny equal treatment to members of any particular race or religion. As we previously noted, the requirement of standing focuses on the party affected and his personal stake in the outcome of the litigation at issue. Plaintiff Lemon asserts his status as a Negro and parent of a child in a public school in Pennsylbania. However, there is no allegation in the complaint which asserts that Lemon or his child is personally affected by any alleged intentional discrimination or de facto segregation in these schools. *There is no allegation that Lemon's child attempted to enroll at any of these schools and was denied admission because of race or religion.* . . the absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical griev-

> ances of others who may be personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected. Flast, supra, 392 U.S. at 110 88 S.Ct. 1942. See also United Public Workers of America vs. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L. Ed. 754 (1947). Race is indeed a relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies, or laws where he himself was not the object of such practice. Consequently, as none of the individual plaintiffs have alleged a personal stake in the instant case, they have failed to establish standing under the equal protection clause..."

See also *Abele v. Markle*, (1971) 452 F.2d. 1121, for further support of the proposition that constitutionality cf laws may be challenged only by those litigants who will suffer some actual or substantial injury from their enforcement, as distinguished from remote, general, or hypothetical possibility of harm. This is exactly the situation before the Court in this case. No plaintiff has alleged that he has been refused admission to any school or been discriminated against in any manner whatsoever by defendant, Evangeline Parish School Board.

Consequently, even the plaintiffs in this suit would lack standing to sue for the relief here sought had they filed such a motion for further relief. If plaintiffs could not seek the relief here sought, certainly, the Government cannot by intervention seek

relief. The addition of zero to zero is still zero. The Supreme Court has repeatedly upheld the general principle that a litigant will not be permitted to achieve plaintiff standing by asserting the rights of third parties. *Tilleston v. Ulman*, 318 U.S. 44 (1942); *Doremus v. Board of Education*, 342 U.S. 429 (1952); see particularly *Flast v. Cohen*, supra, page 99, No. 20. particularly applicable to the position of the Government here is the comment of one court paraphrased slightly as follows:

> ". . . apparently the sole purpose and the only function of the Government is that it shall assume the role of actor so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute. . ." Doremus v. Board of Education, 342 U.S. 429, 431 (1952) (quoting on appeal, the Supreme Court of New Jersey in the same case).

Although this Court found it unnecessary to reach the standing issue in *Lemon*, supra, (page 755, footnote 5) we respectfully submit that is it squarely presented here and raises a substantial federal question which should be decided.

Consequently, we respectfully submit that the Government's application to intervene in this matter, for this purpose, at this time, was untimely and improper under the statutes relied on and that the Government has no standing which would permit it to bring this action. Therefore, we also respectfully submit that the courts below erred in overruling peti-

tioners' motions to dismiss and in permitting the Government to prosecute this action.

II. The decision of the Court of Appeals misinterprets and misapplies this Court's decision in *Norwood v. Harrison*, ___ U.S. ___, 91 S.Ct. ___, 37 L.Ed. 723, and in so doing creates a rule which denies due process of law and equal protection of the law to some children in violation of the Fourteenth Amendment.

The record in this case clearly reflects that with the advent of total integration for the 1969-70 school year, many students left the public school system to attend private schools. There are only two private schools in Evangeline Parish, Sacred Heart Academy, which is church-oriented, and Evangeline Academy, which is also church-oriented. There is no evidence in the record to indicate that either school prohibits admission to children because of their race. Sacred Heart Academy was already in operation and for the school year 1968-69 had an enrollment of 689 white children and no black children. Evangeline Academy was formed for the 1969-70 school year and opened with an enrollment of 2,149 white children and no black children. That same year Sacred Heart Academy's enrollment increased from 689 to 898, still with no black children. It should also be noted here that according to the affidavit filed with the District Court, the attorney who represented Evangeline Academy in Court and who was a member of the Board of Directors of Evangeline Academy, had removed his children

from the public school system in September of 1969 but had enrolled them in Sacred Heart Academy rather than Evangeline Academy. By the 1970-71 school year the enrollment at Evangeline Academy had dropped to 1,868 with still no white children while the enrollment at Sacred Heart Academy had again increased to 980 but with one black student. The following year, 1971-72, the enrollment in Evangeline Academy continued to decrease to 1,577 with no black students, while the enrollment at Sacred Heart continued to increase to 1,044, still with only one black student. For 1972-73, Evangeline Academy's enrollment again decreased to 1,506 while Sacred Heart's enrollment increased to 1,130, with only three black students. For the present year, Evangeline Academy's enrollment again decreased to 1,144, while Sacred Heart Academy's enrollment increased once more to 1,175 with two black students. Neither private school has any black faculty members.

As mentioned above, there was no evidence before the District Court, and he made no finding, that either Evangeline Academy or Sacred Heart Academy maintained a policy of prohibiting admission to children because of race. Neither is there any evidence in the record, nor did the District Court make any finding, that any of the children attending either private school did so in order to avoid integration. Furthermore, the District Court specifically found that the providing of this minimal aid to children attending private schools was not for the purpose of promoting or assisting racial segregation but was for the bene-

volent purpose of assisting all children in the parish in obtaining an education.

The main thrust of the Government's position as shown by their motion for further relief and in brief is that since Evangeline Academy came into existence after integration of the public school system, it was established as a segregated school and the only purpose of the children attending that school was to avoid integration. As noted by the District Court,

> ". . . The United States has carefully avoided attacking the constitutionality of La. R.S. 17-351, the statute under which the school books and supplies are made available to all ' school children of the State of Louisiana' . . ."

Obviously, the Government has very carefully selected for attack only the children who have chosen to attend Evangeline Academy and have very carefully avoided seeking to prohibit textbooks and suppiles to those children who left the public schools in 1969 (as well as before and after) to attend Sacred Heart Academy for the same identical purpose, whatever that purpose may have been. As an example, the children of one of the founders of Evangeline Academy, member of the Board of Directors, and attorney for the academy who removed his children from the public schools in September, 1969, to enroll them in Sacred Heart. This would appear to be the grossest type of discrimination and although clearly rejected by the District Court it appears to have been approved by the Court of Appeals.

Consequently, it clearly appears that the Court of

Appeals adopted the Government's position and held that any school which came into existence after the 1968-69 school year and which happened to have an all-white student body is conclusively presumed to be a segregated school whose students are automatically prohibited from receiving state aid. For example, the Court said at page 2 of the slip opinion (see Appendix "B"),

> ". . . From the record before us, it appears that Evangeline Academy is a racially segregated institution providing an alternative to the court-ordered integration of Evangeline Parish public schools. Within one month of the District Court's desegregation order, Evangeline Academy was incorporated and operative. All of its students are white, and its opening resulted in corresponding attrition of white students from the parish's public schools. . ."

We respectfully submit that the decision of the Court below effectively establishes an invidious classification of children which clearly violates the rational test principle applied by this Court to state and congressional legislation.

The decision of this Court and other federal courts prohibiting this type of irrational classification in civil rights cases, including school cases, are so numerous as not to require citation. In addition, this Court has prohibited this type of irrational classification in other recent cases such as *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); *Phillips v. Marietta Corporation*, 400 U.S. 542, 27

L.Ed. 613, 91 S.Ct. 496 (1971); *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 225, 92 S.Ct. 251 (1971); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972); *Frontiero v. Richardson*, ___ U.S. ___, 93 S.Ct. ___, 36 L.Ed.2d 583 (1973); and *Cleveland Board of Education*, et al. v. LaFleur, et al, ___ U.S. ___, ___ jS.Ct. ___, ___ L.Ed.2d ___, (Decided January 23, 1974) with respect to both equal protection and due process.

Although the Court below rendered its decision in terms of aid to a particular school, it is clear that what is actually being decided is whether or not free textbooks and supplies shall be prohibited to some children while permitted for other children without any rational basis for choosing between them. Here, for all practical purposes, each of the two private schools in Evangeline Parish are equally segregated, or, put another way, equally non-integrated as neither have black faculty members and one has no black students, while the other has only one or two. There is no evidence in the record that either maintains a policy of prohibiting admission because of race. There is no evidence in the record as to why any particular child, or his parent, chose either private school over the public school system.

The Court below, in misreliance on this Court's decision in *Norwood v. Harrison*, supra, has done what the District Court refused to do, that is, to permit the Government to deny free textbooks and supplies to some children who happen to attend a

school which is not integrated while permitting children who attend another private school which is also not integrated to continue to receive such free text books and supplies without any rational basis for such discriminatory policy. Furthermore, even though there may be a rational basis for the United States of America to prohibit state aid to segregation, there is simply no compelling government interest which will justify the invidious discrimination inherent in blanketly denying free textbooks and school supplies to children who happen to attend a private school with an all-white faculty and all-white student body while permitting such textbooks and supplies to children attending another private school with an all-white faculty and virtually all-white student body.

This Court's decision in *Shapiro v. Thompson*, supra, would seem to be directly in point. This case involved both state statutes and a congressionally enacted District of Columbia statute which prohibited public assistance benefits to residents of less than one year. The instant case, although it involves a benevolent state statute which provides minimal educational aid to all children attending any school in the state, also involves an attempt by the Government to prohibit such aid to children who happen to attend a school with no Negro students and no Negro teachers while permitting such aid to children who attend a school with one or two Negro students and no Negro teachers regardless of whether any Negro students have ever applied for admission to the school under attack. In *Shapiro* this Court not only held that such welfare

regulation did not meet the standard equal protection test of a rational basis but should also be viewed under the more strict compelling governmental interest test which it obviously failed to meet.

For example, in *Shapiro* this Court said at 22 L.Ed.2d 600, 611:

> "There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. . . "

With the Court's permission, we would paraphrase that statement of the Court to fit the facts and circumstances of this case as follows:

> "There is no dispute that the effect of the . . . requirement . . . is to create two classes of needy

school children indistinguishable from each other except that one is composed of students who attend a private school with no Negro faculty and only one or two Negro students, and the second of students who attend a private school with no Negro faculty and no Negro students. On the basis of this sole difference the first class is granted and the second class is denied minimal educational aid upon which may depend the ability of the families to obtain for their children an educational alternative to public education—textbooks to learn by, pencil and paper to take notes and examinations, and transportation. In each case, the District Court found that petitioners met the test for minimal education aid in their jurisdictions. On appeal, the Court of Appeals found that appellees met the test for minimal education aid in their jurisdiction except for the requirement that the school they attend be created before 1969 and have at least one Negro student enrolled. On reargument, petitioners' central contention is that the governmental prohibition of benefits to students attending a private school created after 1968 and having less than one Negro student enrolled (even though no Negro student has ever applied for admission) creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. . ."

We respectfully submit that this is the crux of the matter. The District Court recognized the discriminatory nature of the Government's attack on the students attending this one private school and refused to permit such discrimination. The Court of Appeal ap-

parently either did not recognize the discriminatory nature of the Government's position, or ignored it, or misinterpreted this Court's decision in *Norwood v. Harrison*, supra.

In *Norwood*, the attack was on the entire state program of aid to children attending private schools. Here, the Government very carefully avoided an attack on the state statutes themselves and specifically limited its attack to the children attending one particular private school, although there is no difference of legal significance between the children attending either of the private schools in Evangeline Parish. This Court did not invalidate Mississippi's program for minimal educational aid to children attending private schools, or even attending any particular private school. It merely said that it was not constitutionally permissible for the state to promote or assist segregation. In fact, this Court specifically remanded to the District Court for a determination as to whether or not some schools maintained discriminatory policies and were ineligible for state aid while other schools would still be eligible for such aid. This Court even suggested that the District Court enlist the aid of the Mississippi Department of Education in making such determination as between schools.

Certainly, there is no indication in this Court's decision in *Norwood* that the enrollment of one Negro student, in fact, or the date of creation of a particular private school, should be the sole criteria for determining eligibility of children for this minimal state aid.

Furthermore, this Court's decision in *Norwood* seems to specifically reject the only basis for the Government's invidious discriminatory classification in this case, that is, the "number scheme" of year of creation and one Negro student enrolled, when it quoted with approval the statement of the three-judge court in *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 854:

> "... '[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up to only 49 per cent of the support of the segregated institution.' "

Certainly, the mere fact that one Negro child is enrolled at one private school while no Negro child is enrolled at another private school is no rational basis for providing aid to the children of the first private school and denying it to the children of the second private school, particularly where no Negro child has ever applied for, or been denied, admission to the second private school.

Furthermore, although in Louisiana most of the private schools have historically been created and maintained by the Catholic Church, more and more church-oriented schools, as an alternative to what is being taught in public schools, Episcopal, Baptist, Presbyterian, Methodist, etc., are being established. Can our Constitution possibly tolerate the Government's invidious classification of pre-1969-post-1969 as the basis for permitting educational aid to some children

while denying it to other? We respectfully submit that it cannot.

Considering the history of the two private schools in Evangeline Parish, where there is no evidence in the record that either maintains a racially discriminatory policy, can there be any rational basis or compelling governmental interest for providing minimal educational aid to the children attending one while prohibiting such aid to the children attending the other? Is there even any rational basis for concluding that the existence of one has had a more adverse effect on the admittedly unitary public school system in Evangeline Parish than the other? Evangeline Academy, on the one hand, was created in 1969 with 2,149 white students, no black students, and no black faculty; but its enrollment has now decreased to only 1,144 white students. On the other hand, Sacred Heart Academy which had an enrollment of only 689 white students, no black students, and no black faculty members, in 1968, has seen its enrollment increase until it now has 1,175 white students, only two black students, and still no black faculty members. Can these statistics possibly justify the Government's position, apparently approved by the Court of Appeals, in denying minimal educational aid to the children attending Evangeline Academy while permitting such aid to the children attending Sacred Heart? As far as future adverse effect on the unitary public school system in Evangeline Parish is concerned, it would appear obvious that the steadily decreasing non-integrated student enrollment and faculty of Evangeline Academy

is far less dangerous than the steadily increasing non-integrated student body and faculty at Sacred Heart Academy.

Under these facts and circumstances and prior decisions of this Court, it would clearly seem to be constitutionally impermissible to permit the Government, or even a private plaintiff who has not applied for, or been denied, admission to a school, to pick and choose which children-families-citizens of Evangeline Parish should be granted this minimal educational aid and which should not.

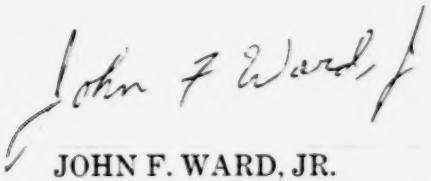
We respectfully submit that the decision of the Court of Appeals and the District Court overruling petitioners' motion to dismiss this complaint due to the Government being an improper intervenor and lacking standing to bring this action should be reversed and the Government's complaint dismissed.

We further respectfully submit that the decision of the Court of Appeals reversing and vacating the District Court's decision refusing to grant the injunction requested by the Government and apparently establishing, or at least approving, the denial of due process and equal protection of the law to some children based on an invidious discrimination classification should be reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



JOHN F. WARD, JR.
Counsel for Petitioners.

CERTIFICATE

I, John F. Ward, Jr., attorney for petitioners and a member of the Bar of the United States Supreme Court, do hereby certify that on this ___ day of January, 1974, I served copies of the foregoing petition for writ of certiorari on the attorneys of record for respondent herein by mailing three copies of same, postage prepaid, to:

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JOHN F. WARD, JR.,
Counsel for Petitioners.

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA OPELOUSAS DIVISION

CIVIL ACTION No. 11,053

JO ANN GRAHAM, ET AL

VERSUS

EVANGELINE PARISH SCHOOL BOARD, ET AL

FOR PLAINTIFFS:	MESSRS. Marion Overton White 1520 N. Market Street Opelousas, Louisiana 70570
FOR PLAINTIFF-INTERVENORS, United States of America	John Leshy and John Parker, Attorneys U. S. Department of Justice Washington, D. C. 20530
FOR DEFENDANTS, Evangeline Parish School Board	John F. Ward, Jr. 206 Louisiana Avenue Baton Rouge, Louisiana 70802 L. O. Fuselier District Attorney J. William Pucheu Assistant District Attorney 13th Judicial District Post Office Drawer 531 Ville Platte, Louisiana 70586
FOR DEFENDANT, Louisiana State Board of Education	Thomas W. McFerrin Assistant Attorney General State Capitol Building Baton Rouge, Louisiana 70802
FOR DEFENDANT-INTERVENORS, Lawrence Vizinat, et al	Preston N. Aucoin 153 S. Court Street Ville Platte, Louisiana 70586

NAUMAN S. SCOTT, JUDGE

RULING

This school desegregation suit was originally filed by private plaintiffs against the Evangeline Parish School Board on May 4, 1965 and has since that time been the vehicle for many changes in the operation of the Evangeline Parish School system. On August 28, 1969 the United States was permitted to appear in this matter as amicus curiae. Subsequently a motion was granted allowing intervention by the United States as a party plaintiff and joining the Louisiana State Board of Education as a party defendant.

The United States has sought to enjoin the defendants from "providing directly or indirectly any financial or other material support including the provision of transportation, books or other property to students attending Evangeline Academy and from failing or refusing to take whatever action is necessary to recover any and all books and property loaned or given to the Evangeline Academy. . .". A hearing was held and testimony taken on this motion.

The United States also filed a motion to enjoin the defendant, Evangeline Parish School Board, from "failing to take steps immediately to disestablish the racially dual transportation system which exists in the Evangeline Parish public schools". Subsequently, the United States has moved for summary judgment on the abolition of the dual transportation system.

In their request for an injunction blocking aid to the Evangeline Academy, the United States has carefully avoided attacking the constitutionality of La. R.S.

17:351, the statute under which the school books and supplies are made available to all "school children of the State of Louisiana". Rather their contention is that the application of this statute under the facts of this case operates to place the State in a position of fostering a dual school system. The language of this Act, passed in its original form in 1928, is very clear and unambiguous in that the aid is not to the schools but rather to the school children of the State of Louisiana.

The Federal Courts of this circuit have had occasion to examine the constitutionality of this very statute. See *Cockran* v. *Louisiana State Board of Education*, 50 S.Ct. 335, 281 U.S. 370, 74 L.Ed. 913. In distinguishing this statute from unconstitutional financial aid to private schools, Judge Wisdom has noted that: "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence". *Poindexter* v. *Louisiana Financial Assistance Commission* (Three-Judge Court), 275 F.Supp. 833, 835, (E.D. La. 1967).

As the attack by the United States is upon the application of the statute under specific facts surrounding this case and not the constitutionality of the statute, the question for this Court is whether a program of State aid recognized to be the product of a racially neutral policy can be considered as significant involvement in maintaining a dual school system where the children receiving this aid choose to attend a racially segregated private school. Griffin v. State of Education, 296 F.Supp. 1178 (E.D. Va. 1969).

The Courts of this nation have consistently held that where a State's actions become so significantly involved in private discrimination, both the State action and the private discrimination are violative of the equal protection clause. *Poindexter* v. *Louisiana Financial Assistance Commission*, *supra*, at 854. The Supreme Court has not formulated an infallible test for detecting "whether the State 'in any of its manifestations' has become significantly involved in private discriminations". *Reitman* v. *Mulkey*, 387 U.S. 369, 378, 18 L.Ed.2d 830, 836, 87 S.Ct. 1627. Such a determination must be made by examining the facts and circumstances of each case presented.

Again in *Poindexter*, Judge Wisdom, speaking for a Three-Judge Court, wrote:

> "Any aid to segregated schools that is the product of the State's affirmative purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant involvement in private discrimination. (*We distinguish, therefore, State aid from tax benefits, free school books, and other products of the State's traditional policy toward charitable and educational institutions*)." 257 F.Supp. 854. (Emphasis added).

Judge Coleman, speaking for a Three-Judge Court, faced with virtually the identical problem presented by the United States request for injunction, wrote:

> "We find no Federal decision which has suggested the invalidation of the beneficent policy of a State

> to furnish textbooks to all of the educable children within its borders. To the contrary, under the settled case law, the State's legitimate interest in the education of its youth, in whatever school the student or his parents may select, is a proper and adequate basis upon which the State may administer its free textbook program.
>
> "We find it wholly illogical to require an alteration of the State's textbook program simply because of the advent of more private schools following the desegregation of the public school system. Depriving any segment of school children of State owned textbooks at this point and time is not necessary for the establishment or maintaining of Statewide unitary schools. . . . There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private schools and subsequently enroll in the public schools now unitary." *Norwood* v. *Harrison* (Three-Judge Court), 340 F.Supp. 1003, 1013 (N.D. Miss. 1972).

Examining the facts of this case, ever mindful of the guides set up in the jurisprudence for determining significant State involvement, the Court cannot classify a recognized "benevolent racially neutral policy" as constitutionally impermissible fostering of a dual school system.

In *Norwood*, Judge Coleman accurately stated that even accepting the conjecture that this type of aid "encourage" attendance in private schools "that if encoragement alone is a sufficient test and if impermissible encouragement necessarily follows from the issuance of books and subsequent attendance at a particu-

lar school, then the books may not be issued to those attending private sectarian schools (something which the Supreme Court has thus far declined to invalidate)."

The action by the Louisiana State Board of Education and the Evangeline Parish School Board in supplying aid to the children attending the Evangeline Academy is not discretionary. See La. R.S. 17:351. The statute states that the designated tax monies "*shall*" be used to supply textbooks and supplies to the school children of Louisiana. There is no requirement to be found which makes as a condition precedent that the child attend a public school. "There could be considerable doubt about the constitutionality, under the *equal protection clause*, of a program which provides free books to some children while denying them to others". *Norwood v. Harrison, supra.* (Emphasis added).

The request of the United States for a preliminary and permanent injunction requiring the Louisiana State Board of Education to cease providing textbooks and supplies to the children of the Evangeline Parish academy is denied.

The Court also has before it for decision the motion for summary judgment by the United States on the question of the Evangeline Parish School Board's failure to adequately dismantle the racially dual transportation system existent in that parish. In support of this motion the United States has made reference to the testimony of Mr. Russell Manuel, Supervisor of

Transportation for the Evangeline Parish School Board. This testimony was brought out at the hearing held on the question of aid to the Evangeline Academy, and has been transcribed and filed as part of the record in this case. Respondents have filed no affidavits in response to this motion, rather they simply state that there is a question of fact as to the dual nature of the transportation system and therefore summary judgment should be denied.

The Court has examined the testimony given by Mr. Manuel and has determined that no question of fact exists on this point. The system remains substantially as it was prior to this Court's order of August 5, 1969 which required the dismantling of the dual transportation system. (See transcript of hearing, page 76, et seq.). The buses are virtually all black or all white, particularly in the Ville Platte area. The United States as plaintiff in intervention and mover on this motion is entitled as a matter of law to summary judgment on this question.

The School Board Superintendent J. Hart Perrodin, School Bus Supervisor Russell Manuel, and Members Mr. Vories Morein, Mr. Cecil Colligan, Mr. D. M. Lefleur, Mr. Charles Armand, Dr. Bobby Deshotel, Dr. Roderick Perron, Mr. Harold Monier, Mrs. Hampton Dupre, and Mr. Joe Forman, as members of the School Board, their agents, officers, employees and successors and all those in active concert and participation with them are ordered to take all necessary measures to eliminate segregated bussing and to insure a completely integrated bus transportation system. An

integrated bus system is defined as a system in which: (a) bus routes are established so that no house or group of houses or habitations is circumvented because of the racial identity of the inhabitants, and (b) pupils are picked up as they are encountered along the bus route until the bus reaches capacity.

The School Board and the Superintendent of Transportation are to present to the Court the proposed plans and policies designed by the Board in accordance with the above directive. These shall be presented no later than ten days after the date of this order.

The motion for preliminary injunction blocking the supplying of books and supplies to the children attending the Evangeline Academy is denied. The motion for summary judgment requiring the Evangeline Parish School Board to dismantle a racially dual transportation system is granted. This opinion constitutes both findings of fact and conclusions of law.

THUS DONE AND SIGNED in Chambers, at Alexandria, Louisiana, on this 28th day of July, 1972.

/s/ NAUMANN SCOTT
United States District Judge

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3033

JO ANN GRAHAM, ET AL,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellant,

versus

EVANGELINE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees,

LOUISIANA STATE BOARD OF EDUCATION,
Added Defendants-Appellees,

LAWRENCE VIZINAT, ET AL,
Defendants-Intervenors-Appelees.

Appeal from the United States District Court for the Western District of Louisiana

(August 22, 1973)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The District Court denied the request of the United States for preliminary and permanent injunctions requiring the Louisiana State Board of Education and the Evangeline Parish School Board to cease providing textbooks and supplies to the children of the Evangeline Academy. We vacate and remand on the authority of *Norwood v. Harrison*, ___ U.S. ___ [41 U.S.L.W. 5094, June 25, 1973].

Norwood, together with the spate of cases involving state aid to parochial schools decided by the United States Supreme Court this past term, *Levitt v. Committee for Public Education*, ___ U.S. ___ [41 U.S. L.W. 5091, June 25, 1973], *Committee for Public Education v. Nyquist*, ___ U.S. ___ [41 U.S.L.W. 5153, June 25, 1973], and *Sloan v. Lemon*, ___ U.S. ___ [41 U.S.L.W. 5181, June 25, 1973], virtually ensure the relief sought by the United States as a plaintiff-intervenor in this school desegregation case.

Although the District Court made no specific findings of fact concerning the provision of free textbooks and transportation by the State to students attending Evangeline Academy and apparently assumed without deciding that the Evangeline Academy is a racially segregated school, the Court's ruling and the record before us indicate clearly that Louisiana was providing just the kind of aid to the type of school which falls within the proscription of *Norwood*. To the extent that it aided segregated private schools, a Mississippi statu-

tory program, in many respects similar to the Louisiana system, was found in *Norwood* to be unconstitutional. Under these programs, textbooks were purchased by the State and lent to students in both public and private schools without regard to the schools' racially discriminatory policies.

From the record before us, it appears that Evangeline Academy is a racially segregated institution providing an alternative to the court ordered integration of Evangeline Parish public schools. Within one month of the District Court's desegregation order, Evangeline Academy was incorporated and operative. All of its students are white, and its opening resulted in a corresponding attrition of white students from the Parish's public schools. From its inception, the Academy received aid from the Parish School Board: bus transportation and textbooks for students, and library books for the school. State assistance to such a school and its students had the inevitable effect of frustrating the order disestablishing a dual public school system.

In *Norwood*, the Supreme Court found that "[a] textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases.[1]

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[1] *Brown v. South Carolina Board of Education*, 296 F. Supp. 199 (S.C. 1968), *aff'd curiam*, 393 U.S. 222 (1968); *Poindexter v. Louisiana Finance Commission*, 275 F.Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). See *Wallace v. United States*, 389 U.S. 215 (1967), *aff'g Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D. Ala. 1967). Mississippi's tuition grant programs were invalidated in *Coffey and United States v. State Educational Fi-*

> Free textbooks [lent to students], like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. . . . When, as here, . . . [a necessary learning expense] is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State . . . thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' *Lee v. Macon County*, 267 F.Supp. 458, 475 (M.D. Ala. 1967)." ___ U.S. at ___ [41 U.S.L.W. at 5091].

Without findings of fact, we cannot properly deal with the argument concerning the transportation of students. On remand, however, the District Court will need to reconsider the entire case insofar as it relates to state aid to Evangeline Academy. The District Court should consider, in the light of *Norwood*, all of the State's assistance to the Academy in determining what further relief might be necessary to disengage the State and its local agencies from the operation of the segregated private school.

VACATED AND REMANDED.

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nance Commission, 296 F.Supp. 1380 (S.D. Miss.); *Coffey and United States v. State Educational Finance Commission*, S.D. Miss., CA No. 2906, decided Sept. 2, 1970 (unreported).

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3033

JO ANN GRAHAM, ET AL,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellant,

versus

EVANGELINE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees,

LOUISIANA STATE BOARD OF EDUCATION,
Added Defendants-Appellees,

LAWRENCE VIZINAT, ET AL,
Defendants-Intervenors-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 22, 1973, 5 Cir., 1973, ___ F.2d ___).

(October 30, 1973)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appendix C

§ 158. School buses for transportation of children; employment of bus operators; improvement of school bus turnarounds

Parish school boards may provide transportation for children attending any school of suitable grade approved by the State Board of Education and living more than one mile from such school; and for that purpose parish school boards may employ school bus operators as hereinafter defined in R.S. 17:491.

Parish school boards may provide gravel or contribute funds to the local governing authority for the graveling of school bus turnarounds. As amended Acts 1969, No. 143. § 1.

§ 351. Severance tax fund; dedication for school books and supplies

The severance tax fund of the state shall be devoted after allowing funds and appropriations as provided by the constitution, first, to supplying school books, and second, to supplying school supplies, such as library books, pencils, pencil paper, ink paper, pens, ink, and the like to the school children of the State of Louisiana. Thereafter any further sums as remain in the said severance tax fund shall be disposed of in accordance with the constitution and laws of the state.

(Source: Acts 1928, No. 100, § 1; Acts 1936, No. 153, § 1.)

§ 352. Distribution of books and supplies free of cost

The state board of education shall distribute these

school books and school supplies for school children free of cost to such children.

(Source: Acts 1928, No. 100, § 2; Acts 1936, No. 153, § 1.)

§ 353. College and university students; provisions inapplicable

The provisions of R.S. 17:351 and 17:352 shall not apply to persons attending colleges and universities.

(Source: Acts 1928, No. 100, § 3; Acts 1936, No. 153, § 1.)

No. 73-1156

In the Supreme Court of the United States

OCTOBER TERM, 1973

EVANGELINE PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This petition arises as part of a school desegregation action commenced in 1965 by black parents in Evangeline Parish, Louisiana. On August 5, 1969, pursuant to a remand from the court of appeals, the district court ordered immediate implementation of a desegregation plan prepared by the Office of Education, Department of Health, Education, and Welfare. On August 28, 1969, the United States was permitted to appear in this matter as an *amicus curiae*, and in July 1971 a motion was granted allowing intervention by the United States as a party plaintiff and joining the Louisiana State Board of Education as a party defendant.[1]

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[1] Intervention was pursuant to Section 902 of Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2.

The United States thereafter sought a preliminary injunction prohibiting the petitioner school board from providing any financial or other material support to the Evangeline Academy, a segregated private school, alleging that such aid by the school board had the purpose and effect of maintaining and perpetuating a racially segregated educational system in Evangeline Parish.[2] The district court denied the injunction and rendered judgment in favor of the defendants (Pet. App. 35-42), relying primarily on the opinion of the three-judge district court in *Norwood* v. *Harrison*, 340 F. Supp. 1003 (N.D. Miss.).[3]

After this Court, in *Norwood* v. *Harrison*, 413 U.S. 455, had reversed the decision relied upon by the district court in this case, the court of appeals vacated the judgment of the district court and remanded for reconsideration of "the entire case insofar as it relates to state aid to Evangeline Academy" (Pet. App. 46). The court of appeals denied rehearing on October 30, 1973 (Pet. App. 47), and the petition for a writ of certiorari was filed on January 28, 1974.

1. Petitioners assert that the motion of the United States to intervene in this case was untimely since the case had allegedly been completed before the intervention was granted (Pet. 11).[4] But, as petitioners themselves note, the petitioner school board is currently operating under a court order issued in this case directing it to

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[2]The United States also sought to disestablish the school district's racially segregated transportation system.

[3]The district court did order the establishment of a desegregated bus system (Pet. App. 40-42).

[4]Petitioners did not preserve their objection to the government's intervention by a timely cross-appeal in the court of appeals.

maintain a desegregated school system. This proceeding is, in effect, designed to compel petitioners to comply with that order barring discrimination, and to bring to the court's attention deficiencies in the effectiveness of the compliance procedures previously ordered. See *Equal Employment Opportunity Commission* v. *United Ass'n of J & A of Plum., Etc.*, 438 F. 2d 408, 414 (C.A. 6), certiorari denied, 404 U.S. 832. Cf. *United States* v. *Parke, Davis & Co.*, 365 U.S. 125; *Louisiana* v. *United States*, 380 U.S. 145, 154-156.

The suggestion in the petition (Pet. 9-21) that the United States was without authority to seek relief as to segregated transportation or aid to private schools is likewise erroneous. Under 42 U.S.C. 2000h-2, the United States is entitled on intervention to the same relief as if it had instituted the action. See *Spangler* v. *United States*, 415 F. 2d 1242 (C.A. 9). Both of these claims could have been raised by an original plaintiff in a school desegregation case. See, *e.g.*, *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (C.A. 5) (transportation); *McNeal* v. *Tate County School District*, 460 F. 2d 568 (C.A. 5), certiorari denied *sub nom. Tate Educational Foundation, Inc.* v. *McNeal*, 413 U.S. 922 (aid to private schools).

2. In remanding the case, the court of appeals noted (Pet. App. 44-45):

> [T]he [District] Court's ruling and the record before us indicate clearly that Louisiana was providing just the kind of aid to the type of school which falls within the proscription of *Norwood*. * * *
>
> [The] Evangeline Academy is a racially segregated institution providing an alternative to the court ordered integration of the Evangeline Parish public schools.

The evidence in the record amply supports that conclusion of the court of appeals. The state aid being provided—books and transportation—is similar to the aid held impermissible in *Norwood* and is provided under a similar procedure (Pet. App. 38), and the Evangeline Academy was shown to be a racially discriminatory school[5] (*id.* at 45). The petitioners, in effect, ask this Court to review factual determinations of the courts below, because, given those findings, the decision of the court of appeals was merely a proper application of the long-standing rule, reaffirmed in *Norwood*, which forbids state support of segregated schools "through any arrangement, management, funds or property * * *." *Cooper* v. *Aaron*, 358 U.S. 1, 19.

Since the court of appeals properly applied well-settled legal principles to the facts of this case, further review is not warranted.

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[5]Petitioners contend that the opinion below misapplies *Norwood* v. *Harrison*, *supra*, since this case involves only the Evangeline Academy, while in *Norwood* the entire state program of textbook distribution to private schools was under attack (Pet. 29). Therefore, petitioners contend, *Norwood* does not justify challenging state aid to one private school, and not to another in the same parish. But this Court in *Norwood* noted that its holding required a "school-by-school determination" of whether racially restrictive admission policies were being followed. 413 U.S. at 471. The court of appeals correctly concluded that this record demonstrates that such policies were followed by the Evangeline Academy. No such showing was made for the Catholic parochial school in the same parish, and thus there was no basis for relief against it. In any event, nothing in *Norwood* suggests that state aid to all racially discriminatory schools in a given area must be challenged simultaneously.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

APRIL 1974.

[illegible]